No. 97-42

(16)

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In the Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN ENTERPRISES,
Petitioner,

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENTS THE UMWA COMBINED BENEFIT FUND AND ITS TRUSTEES

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QUESTION PRESENTED

Whether the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), as applied to petitioner Eastern Enterprises, Inc. ("Eastern"), violates the Due Process and Takings Clauses of the Fifth Amendment, where Eastern voluntarily participated in the collectively bargained coal industry multiemployer health care funds for more than 40 years, and where the Coal Act's only imposition on Eastern is to require it to provide for the future health care of some of Eastern's own retirees, all of whom left covered service in the coal industry years ago, worked for Eastern longer than they worked for any other signatory employer still in business, and continued, throughout the years until the Coal Act was passed, to receive health benefits from the multiemployer funds in which Eastern participated.

LIST OF PARTIES

In addition to the parties named in the caption, the other parties in the court of appeals were the UMWA Combined Benefit Fund and its Trustees (Marty D. Hudson, Thomas O. S. Rand, Elliot A. Segal, Carlton R. Sickles, Gail R. Wilensky, Michael H. Holland, and William P. Hobgood), and Peabody Holding Company, Eastern Associated Coal Corp., and Coal Properties Corp. All of these parties are respondents in this Court.

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BRIEF FOR RESPONDENTS THE UMWA COMBINED BENEFIT FUND AND ITS TRUSTEES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-23) is reported at 110 F.3d 150. The district court's judgment and order (Pet. App. A-24 to A-27) are not reported. An earlier opinion by the district court (Pet. App. A-28 to A-38) is reported at 942 F. Supp. 684.

STATUTE INVOLVED

This case concerns the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), 26 U.S.C. §§ 9701 *et seq.* and 30 U.S.C. § 1232(h), which was enacted as part of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3036-3056. The entire statute, as it appears in the Statutes at Large, is reproduced in the appendix to the brief in opposition filed by the UMWA Combined Benefit Fund and its Trustees. Combined Fund App. 1a-39a.

STATEMENT OF THE CASE

A. Introduction And Summary

This case arises out of congressional action taken in 1992 to preserve a private medical care program for more than 100,000 retired and disabled coal miners and their families. The retired and disabled miners in question worked primarily in underground bituminous coal mines in Appalachia during the decades from the 1930s to the 1980s. The beneficiaries include thousands of miners with crippling mine-related injuries, and their spouses, widows, and other dependents. Many of the retirees worked in the mines during "the days of the pick and shovel and dynamite, when cave ins were not uncommon and methane explosions often brought sudden disaster." 138 Cong. Rec. S17,633 (daily ed. Oct. 8, 1992) (statement of Sen. Rockefeller). The average age of the Combined Fund's beneficiary population, including dependents, is 75. Approximately 40 percent of the beneficiaries are over 80.

For more than 40 years, these retired and disabled miners and their families, many of whom live in remote mining communities with limited health care facilities, received medical care benefits from a private multiemployer benefit system—the United Mine Workers of America ("UMWA") Health and Retirement Funds (the "Funds"). Petitioner Eastern Enterprises, Inc. ("Eastern"), together with hundreds of other unionized coal companies signatory to labor agreements with the UMWA, voluntarily participated in and benefited from this multiemployer medical care system for four decades. From the Funds' creation in 1946 until Eastern sold its coal operations in 1987, Eastern, which held itself out as the fifth largest coal company in the United States (R 574), employed thousands of coal miners in West Virginia and Pennsylvania.[1] Toiling underground in working conditions both difficult and dangerous, these miners generated substantial

[1] "R" refers to the parties' Joint Appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court. "JA" refers to the Joint Appendix in this Court.

profits for Eastern, while earning wages and service credits toward their pensions and retiree health benefits. After serving at least 20 years in the mines and reaching age 60 (later reduced to age 55), or after being totally disabled in a mine accident, Eastern's miners were eligible to retire and receive medical care from the Funds for themselves and their dependents. R 892-93, 1215. The availability of health and retirement benefits was a remarkable achievement for coal miners in the 1950s. Prior to that time, "you couldn't find a retired coal miner. He worked until he died or got killed in the mines." R 909.

In the late 1980s, however, the UMWA health care Funds were on the verge of financial collapse. Due to rapidly escalating health costs and a declining contribution base of unionized employers, the Funds were facing a projected deficit of $300 million by 1993, and the multiemployer benefit system was in serious jeopardy. JA 236a. Congress held hearings and considered numerous recommendations and legislative proposals, including the findings and recommendations of a bipartisan Coal Commission appointed by Secretary of Labor Elizabeth Dole. After three years of deliberation, Congress adopted the Coal Act, which preserves the private multiemployer fund system, safeguards the hard-earned medical benefits of retired miners, and imposes liability only on those employers, like Eastern, that had voluntarily participated in, and benefited from, the multiemployer health care system in the past, and that still had former employees receiving benefits from that system when the Coal Act was passed.

The Coal Act apportions liability on a "pay for your own" basis. It does so for all signatory employers that remain in business, without regard to whether they did or did not continue contractual contributions through the time of the statute's enactment. In Congress' judgment, the companies that voluntarily participated in the UMWA Funds over the years and formerly employed the retirees in question are the companies that are most responsible for the retirees' eligibility to receive health care from the

UMWA multiemployer system and the companies that should shoulder the costs of such care. The basic rationality of this "pay for your own" system is totally obscured by the misleading submissions of petitioner Eastern and the *amici* supporting Eastern.

In accordance with Section 9706 of the Coal Act, the Secretary of Health and Human Services assigned Eastern responsibility for paying medical costs for certain specific former Eastern employees (and their surviving spouses and dependents) who were continuing to receive health benefits from the UMWA Funds. Eastern was *not* assigned liability for any retiree who had not worked for Eastern, or for any so-called "orphan" miners who formerly worked only for employers no longer in business. Eastern concedes this point in its brief. Pet. Br. 15-16 n.32.

Beginning in November 1993, Eastern initiated a three-prong legal attack in the United States District Court for the District of Massachusetts to avoid paying for the beneficiaries assigned to it. Eastern contended, first, that the Secretary of HHS incorrectly assigned beneficiaries to Eastern; second, that if the assignments were correct, the Coal Act is unconstitutional; and third, that if the assignments were correct and the Coal Act is valid, Eastern is entitled to be indemnified for its Coal Act liabilities by the company (Peabody Holding Co.) to which Eastern sold its coal mining subsidiary in 1987.

While the case was pending in the district court, Eastern sought administrative review of the Secretary's assignment of beneficiaries, asserting that the beneficiaries should have been assigned to Eastern's former coal mining subsidiary, Eastern Associated Coal Corp. ("EACC"), even though the beneficiaries in question never worked for EACC or for EACC's current owner, Peabody. In January 1995, the Social Security Administration ("SSA") issued a final determination on Eastern's request for administrative review of the assignment of two beneficiaries—Samuel and Josephine East. R 602-03. Samuel East was a coal miner

who worked as a hand loader and cutting machine operator for Eastern for 26 years, from 1934 to 1960. JA 142a, 216a. In total, during his career, Mr. East worked in coal mines for 41 years, first in Alabama from 1926 to 1934, and then in West Virginia until he retired at age 62 in 1967. JA 212a, 216a. Mr. East received health benefits from the UMWA Funds until his death in 1984, and his widow Josephine was a beneficiary of the Funds at the time the Coal Act was passed. JA 216a-217a; R 2325. When SSA announced its final determination concluding that Mrs. East was properly assigned to Eastern, the agency's ruling necessarily rejected Eastern's across-the-board argument that all of its former employees and their dependents should have been assigned to EACC. The parties therefore treated the SSA determination as a "test case" and proceeded to litigate Eastern's statutory challenge on that basis.[2]

Both the district court and the court of appeals rejected Eastern's statutory argument that the Secretary's assignment of liability to Eastern was based on an erroneous interpretation of the Coal Act. Pet. App. A-6 to A-9, A-26 to A-27, A-32 to A-35. Eastern has abandoned that argument in this Court, and the propriety of the Secretary's assignments to Eastern is no longer at issue. Eastern's third-party claim for indemnification was stayed in the district court pending appellate review of Eastern's constitutional claims. Pet. App. A-27.

After full briefing and oral argument, the court of appeals upheld the constitutionality of the Coal Act as applied to Eastern. Pet. App. A-9 to A-23. Applying precedent from this Court under both the Due Process

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[2] Although Samuel East's employment records show that he worked for Eastern for 26 years (*i.e.*, from 1934 to 1960), the court of appeals referred in its opinion to only the last 14 of these years (*i.e.*, 1946 to 1960). *See* Pet. App. A-5 to A-6. This was because, in making the assignments, SSA traced Mr. East's employment history back only to 1946, the year in which the UMWA multiemployer health care system was created. JA 220a.

and Takings Clauses, the court of appeals concluded that "[t]he Coal Act was motivated by a legitimate legislative purpose; the assignment system which it created lies within the wide universe of rational measures that were available to Congress as vehicles for furthering that purpose; and the statutory scheme, as applied, does not impermissibly confiscate Eastern's property." Pet. App. A-23. The court's holding and reasoning are fully in accord with similar rulings and comprehensive opinions from the Second, Third, Fourth, Sixth, and Seventh Circuits, all of which have rejected constitutional challenges to the Coal Act.[3]

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[3] *See LTV Steel Co. v. Shalala*, 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995); *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688 (3d Cir. 1996); *Holland v. Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124 (4th Cir. 1996); *Blue Diamond Coal Co. v. Secretary of HHS*, 79 F.3d 516 (6th Cir.), *cert. denied*, 117 S. Ct. 682 (1997); *Barrick Gold Exploration, Inc. v. Hudson*, 47 F.3d 832 (6th Cir.), *cert. denied*, 116 S. Ct. 64 (1995); *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 117 S. Ct. 50 (1996).

In addition, a number of district courts have sustained the Coal Act against constitutional attacks. *Lone Star Steel Company v. Chater*, C.A. No. 3:94-CV-652-R (N.D. Tex. Aug. 30, 1996); *Holland v. High-Tech Collieries, Inc.*, 911 F. Supp. 1021 (N.D. W. Va. 1996); *Holland v. Imperial Colliery Co.*, C.A. No. 1:94-0793 (S.D. W. Va. Dec. 7, 1995); *Bellaire Corp. v. Chater*, 1997 U.S. Dist. LEXIS 14298 (D.D.C. Apr. 21, 1997); *Associated Electric Cooperative, Inc. v. Hudson*, 1997 U.S. Dist. LEXIS 14298 (D.D.C. Apr. 21, 1997); *Association of Bituminous Contractors v. Shalala*, 1997 U.S. Dist. LEXIS 14298 (D.D.C. Apr. 21, 1997), *appeal pending*, No. 97-5132 (D.C. Cir. docketed May 27, 1997); *Unity Real Estate Co. v. Hudson*, 977 F. Supp. 717 (W.D. Pa. 1997), *appeal pending*, No. 97-3234 (3d Cir. docketed Apr. 30, 1997); *Barnes & Tucker Co. v. Hudson*, 1997 U.S. Dist. LEXIS 14390 (W.D. Pa. Mar. 18, 1997), *appeal pending*, No. 97-3236 (3d Cir. docketed Apr. 30, 1997); *Mary Helen Coal Corp. v. Hudson*, 976 F. Supp. 366 (E.D. Va. 1997), *appeal pending*, No. 97-2331 (4th Cir. docketed Sept. 30, 1997); *Canyon Coals, Inc. v. Holland*, No. 4:94-CV-19-M (W.D. Ky. Sept. 3, 1997); *The Pittston Company v. United States*, C.A. No. 3:97CV294 (E.D. Va. Sept. 11, 1997); *Drydock Coal Co. v. Shalala*, C.A. No. C2-94-927 (S.D. Ohio Nov. 13, 1997); *Holland v. Robert Coal Co.* 1997 U.S. Dist. LEXIS 18922 (D.D.C. Nov. 17, 1997); *Holland v. Cardiff Coal Co.*, C.A. No. 1:96-0310 (S.D. W. Va. Dec. 17, 1997).

In attempting to distinguish itself from the many companies whose attacks on the Coal Act have been rejected, Eastern makes a series of erroneous statements and conclusory assertions that create a misleading impression of the historical background of the statute and Eastern's participation in the coal industry. At the same time, several of the very companies from which Eastern seeks to distinguish itself have filed amicus briefs in this Court, seeking to align themselves with Eastern and contend, notwithstanding the outcomes of their own litigation, that the Coal Act is invalid as applied to them as well.[4] Among other things, Eastern erroneously states that it departed the coal industry more than 30 years ago; attempts to conceal its 41-year history of voluntary participation in the Funds; ignores the findings of Congress, the Coal Commission, and several courts, that coal industry retirees had legitimate expectations of receiving medical benefits from the Funds during their remaining years; erroneously suggests that Congress' authority in imposing Coal Act liability is limited to "blameworthy" companies that dumped their retirees into the Funds; and ignores the central concept of liability underlying the Coal Act—"pay for your own" retirees in the multiemployer health care system.

To set the record straight and put this case in proper context, we respond to many of the factual inaccuracies in Eastern's submission, summarize the history of federal involvement in coal industry medical care, describe Eastern's 41-year participation in the UMWA Funds, and set

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[4] LTV and Davon lost in the district court and the court of appeals, and this Court denied certiorari. Bellaire and Allied Signal lost in the district court and chose not to appeal. Unity, Barnes & Tucker, and Mary Helen lost in the district court, and their appeals are pending. Pittston's constitutional challenge was dismissed on res judicata grounds in the district court, and the judgment has not yet become final. *See* note 3, *supra*.

forth Congress' rationale in assigning Coal Act liability to former signatory employers such as Eastern.

B. The Coal Act And Its Historical Background

Of the many cynical and artificially isolationist statements that Eastern makes, one of the most egregious is the assertion that it was "entirely unforeseeable" that Congress would choose to intervene to avert the collapse of the UMWA multiemployer health care system and the disruptive impact that such a collapse inevitably would have had on the coal industry and the economy as a whole. Eastern simply ignores the special health concerns facing retired coal miners and their families,[8] the resulting significance of retiree health care issues in collective bargaining, the long history of federal regulation of coal miner health issues, and the unique involvement of the federal government in the UMWA multiemployer system. Eastern also disregards the predictable effect on a multiemployer system of decades of employee accumulation of service credits toward retiree health care eligibility, based on employment with hundreds of constantly changing coal companies, many with deliberately obscure or complex corporate affiliations and ownership structures, and many having passed out of existence or left the coal business long before their former employees' health care benefits had been provided.

[8] The Annual Reports of the UMWA Health and Retirement Funds include letters from beneficiaries and articles showing the hazards of coal mining, the health problems facing miners and their families, and the role the Funds have played in providing benefits in times of need. *See, e.g.*, R 948 ("lost an arm and a leg in the coal mines of West Virginia"), R 991 ("stream of casualties from the surrounding mines—men with backs or limbs broken, bashed chests or other injuries"), R 993 ("22 men were trapped and killed in an early morning explosion . . . . In this same pit 37 died last year"), R 1025 ("75 children and 16 windows left by mine tragedy"), R 1087 ("How could we, retired coal miners from the old days, meet the disastrous events of sickness without the Welfare and Retirement Fund's help?"), R 1101 ("Another victim of the mine explosion was Virgil Tanner. His widow was left destitute").

Like other employers that have challenged the validity of the Coal Act, Eastern would prefer to have nothing to do with its former employees. For Eastern, it is a matter of supreme indifference whether those retirees and their families manage to obtain health care financed by other employers or whether they simply fend for themselves. As long as Eastern is not involved, it is satisfied. Fortunately, neither Congress nor the courts below shared this view. With some 1400 former employees and dependents still receiving benefits from the UMWA multiemployer system when the Coal Act was passed, Eastern pretends to be shocked that Congress could conclude that Eastern should bear some measure of responsibility for the Funds' financial crisis. The court of appeals was unimpressed by Eastern's effort to "feign astonishment . . . ." Pet. App. A-22. As the court explained, "[h]aving contributed to the expectation of lifetime health benefits for miners, Eastern had every reason to anticipate that it might be called upon to bear some of the financial burden that this expectation engendered." *Id.*

Although we do not repeat all of the historical evidence that supports the court of appeals and contradicts Eastern, we summarize the salient factors supporting the decision below.

1. *Establishment Of The UMWA Multiemployer Health Care System*

Coal mining is a hazardous occupation that has resulted in special regulation by the federal government, beginning with the establishment of the Bureau of Mines in the Department of the Interior in 1910. S. Rep. No. 91-411, at 3 (1969) *reprinted in* 1 Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., Federal Coal Mine Health and Safety Act of 1969 and Amendments (1975). The health-related hazards associated with coal mining are magnified in the eastern bituminous coal fields, where the oldest and highest quality coal is found in deep underground mines in isolated

rural areas. JA 250a. Historically, these areas of Appalachia did not attract many doctors or medical professionals, and health care left much to be desired. JA 261a-264a. The death rate for coal miners in 1946 was 50 percent higher than the death rate for the population as a whole. R 1919.

The mine workers' union, the UMWA, began pressing for medical reform in the 1930s and 1940s. In 1946, when coal operators rejected the union's demands for a health and welfare fund for miners, the union struck. To end the strike and avoid further disruption in the economy, President Truman directed Secretary of the Interior Krug to seize the mines and negotiate with the union. 11 Fed. Reg. 5593 (1946). The negotiations culminated in the historic Krug-Lewis Agreement between the federal government and the UMWA. The Agreement provided various health and retirement benefits to UMWA members and their dependents and survivors, financed by mandatory contributions from signatory employers and wage deductions. JA 261a-263a. The Agreement, executed at the White House on May 29, 1946, created the UMWA multiemployer health and retirement fund system. R 610-14.

Under the Krug-Lewis Agreement, the federal government committed to conduct a comprehensive study of medical facilities and medical care in the nation's coal mining areas. JA 263a. At the request of Secretary Krug, the survey was conducted and a report prepared by Rear Admiral Joel T. Boone of the United States Navy Medical Corps. The report found that medical care in many mining communities was a "disgrace to [the] nation" and "in many instances deplorable." *Id.* at 263a-264a.

2. *Development Of The UMWA Multiemployer System And Continued Federal Involvement*

Although the mines were returned to private control in 1947, it did not end the federal government's involvement with the coal industry or its multiemployer benefit fund. On March 23, 1948, President Truman issued Executive Order No. 9939, creating a Board of Inquiry to look into a nationwide work stoppage in the coal industry, which had been precipitated by the inability of the union and management trustees to agree on the administration of retirement benefits. 13 Fed. Reg. 1579 (1948). In accordance with the suggestion of Speaker of the House Joseph Martin, Senator Styles Bridges of New Hampshire was appointed as neutral trustee. Senator Bridges introduced a plan that, among other things, set eligibility for retirement benefits at age 62 with 20 years of service. This plan was approved by UMWA-appointed Trustee John L. Lewis, and the fund's eligibility criteria for retiree benefits were established.[6] JA 264a.

In 1950, the UMWA and the coal operators created a new multiemployer fund called the UMWA Welfare and Retirement Fund of 1950 (the "1950 W&R Fund"), which succeeded to the assets and liabilities of the prior fund. R 635-46. The 1950 W&R Fund provided health and retirement benefits to UMWA miners and "their families and dependents," and included "benefits on account of sickness, temporary disability, permanent disability, death or retirement . . . ." R 639. Employer contributions to the 1950 W&R Fund were not tax deductible until 1954, when Congress amended the Internal Revenue Code. Congress wrote the amendment in such a way that it effectively applied only to the 1950 W&R Fund. JA 266a. *See* 26 U.S.C. § 404(c) (1954).[7]

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[6] Trustee Owen, the operator-appointed trustee, unsuccessfully challenged Senator Bridges' plan in court. *See Van Horn v. Lewis*, 79 F. Supp. 541 (D.D.C. 1948).

[7] In recommending the amendment, the Senate Finance Committee emphasized that the fund was "established during a period of Government operation" and was "the result of an agreement between employee representatives and the United States Government during a period of Government seizure and operation of most of the productive facilities of the industry." S. Rep. No. 83-1622, at 56 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4621, 4687. *See also* H.R. Conf. Rep. No. 83-2543, at 43 (1954), *reprinted in* 1954 U.S.C.C.A.N. 5280, 5303.

To provide better medical care in rural coal mining communities, the 1950 W&R Fund financed the construction of 10 hospitals in Kentucky, Virginia, and West Virginia. JA 265a. These hospitals, which opened in 1955 and 1956, were dedicated as "memorial hospitals in the memory of those men who died without hospitals, and without proper medical attention . . . ." R 919, 920. The hospitals faced financial difficulties in the 1960s. With $8 million in assistance from the federal government, the hospitals were sold to a regional authority established by the United Presbyterian Church, U.S.A., which continued their operation.[8] Although the hospitals were no longer owned by the 1950 W&R Fund, they continued to provide medical services to active and retired miners and their dependents, and the Fund reimbursed the hospitals for the medical care provided to Fund beneficiaries. JA 267a.

In 1969, to further address the health-related problems of coal mining, Congress enacted the Federal Coal Mine Health and Safety Act. Among other things, this statute established health and safety standards for coal mines, required medical tests for miners, and created a federal Black Lung program to provide benefits to miners disabled with pneumoconiosis, and their survivors.[9] The statute has been amended several times, including the Black Lung Benefits Revenue Act of 1977, which modified the system for paying Black Lung benefits. *See* Pub. L. No. 95-227, 92 Stat. 11 (1977).

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[8] With the support of Assistant Secretary of Labor Daniel Patrick Moynihan and the personal involvement of President Kennedy (JA 267a), federal government assistance came in the form of a $3.9 million grant in June 1963, and a $4.1 million loan in June 1964. Congressional Research Service, The Library of Congress, *Policy Precedents for Federal Involvement in Coal Health Matters*, CRS-5 to 6 & n.10 (Oct. 4, 1990). In 1972, Congress forgave the government's loan. Priv. L. No. 92-161.

[9] *See generally* Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969 and Amendments*, 94th Cong., 1st Sess. (Comm. Print 1975). *See also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

In 1974, partly in response to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), the coal operators and the union divided the 1950 W&R Fund into four separate multiemployer plans, two of which (the 1950 Benefit Trust and 1974 Benefit Trust) provided health benefits to retired miners. R 747-49. In 1974, Congress again enacted special provisions in the Internal Revenue Code, uniquely applicable to the UMWA Funds, to alleviate the potential tax burdens that otherwise would have accompanied the restructuring of the 1950 W&R Fund. The rationale supporting these special provisions was the same as the one that supported the original enactment of Section 404(c) of the Internal Revenue Code twenty years earlier—*i.e.*, supporting the viability of a private multiemployer system that originally was created through government intervention. *See* 26 U.S.C. §§ 277, 404(c).

3. *Financial Crisis And Appointment Of The Federal Coal Commission*

In 1989, after the expiration of the National Bituminous Coal Wage Agreement ("NBCWA") of 1984, a bitter and protracted labor dispute developed between the UMWA and the Pittston Coal Company, a major coal producer. The dispute, which resulted in a 10-month strike, centered on the funding of health benefits for retired coal miners and their dependents. Pittston refused to contribute to the multiemployer benefit funds and cut off health benefits to retirees in its individual company plan. In October 1989, Senators Rockefeller, Byrd, and Heinz introduced S.1708, the Coal Industry Health Benefits Stabilization Act of 1989. *See* 135 Cong. Rec. S12,313, S12,340 (daily ed. Oct. 2, 1989). Identical legislation was introduced in the House of Representatives on October 5, 1989. *See* 135 Cong. Rec. H6987 (daily ed. Oct. 12, 1989).[10]

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[10] Pittston's cut-off of contributions and retiree health benefits was symptomatic of a broader problem. As noted by Senator Heinz, "we are sitting on a time bomb and already 16 coal companies have

While Congress deliberated and collective bargaining failed to resolve the dispute, Secretary of Labor Elizabeth Dole intervened and appointed former Secretary of Labor William J. Usery as mediator. As part of the eventual settlement of the Pittston dispute, Secretary Dole established on March 12, 1990 a special bipartisan advisory commission called the Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal Commission"). JA 232a. The Secretary authorized the Coal Commission to analyze and make recommendations regarding the UMWA multiemployer health care system, including arrangements to assure its long-term financial viability. JA 232a. Former Labor Secretary Usery was appointed Chairman of the Coal Commission.

The Coal Commission submitted its findings and recommendations to Secretary Dole in November 1990 in a report entitled "Coal Commission Report: A Report to the Secretary of Labor and the American People." JA 231a-344a. Recognizing the historical origins of the UMWA Trusts, the Coal Commission observed:

> The medical care delivery system that has evolved is as much a creature of government as it is of the collective bargaining process. There is a line running from the original Boone Report to the present system. In a way, the original Krug-Lewis agreement predisposed if not predetermined the system that evolved.

JA 274a. The Coal Commission found that retired coal miners had legitimate expectations of receiving health care for life but that that expectation was in peril:

> Retired coal miners have legitimate expectations of health care benefits for life; that was the promise

gone back on the promises made to miners by ending all contributions to the [UMWA] health benefit funds." 135 Cong. Rec. S12,340 (daily ed. Oct. 2, 1989). The proposed legislation provided incentives for coal producers to remain signatory to agreements requiring contributions to the benefit funds, and disincentives to discourage companies from withdrawing from the benefit funds.

> they received during their working lives and that is how they planned their retirement years. That commitment should be honored. But today those expectations and commitments are in jeopardy.

JA 245a-246a.[11] The Coal Commission identified three developments, the combination of which "has left the Funds, which were created to provide retired coal miners and their families with one of the finest health care programs in the nation, in a financial crisis." JA 246a.

First, the Coal Commission found that "the number of coal companies making contributions to the Funds has declined significantly." JA 246a.[12] Second, it recognized the dramatic increase in the cost of health care between 1950 and 1990, stating that "[i]n the past 10 years alone, the total cost of [annual] health care benefits paid by the Funds has doubled from $117.4 million to $245.3 million." *Id.* Third, the Coal Commission noted the "steady increase in the number of orphaned retirees whose employers have either gone out of business or no longer provide health care benefits." *Id.* In light of these facts, and in light of its finding that the 1950 and 1974 Benefit Trusts' funding bases were declining faster than their beneficiary populations, the Coal Commission predicted that the Benefit Trusts would have a combined estimated deficit of $300 million by 1993. JA 247a.

The Coal Commission recognized that the collective bargaining process was inadequate to provide a long-term solution to the health care crisis. JA 248a. By its very nature, collective bargaining could address only those employers that were still mining coal and were still doing so

[11] Similarly, the Commission explained in its Executive Summary that "[t]he Commission firmly believes that the retired miners are entitled to the health care benefits that were promised and guaranteed them and that such commitments must be honored." JA 237a.

[12] The Coal Commission found that, while companies contributing to the UMWA multiemployer health benefit system in 1950 represented 80 percent of the coal produced in the nation, by 1990 companies making contributions to the UMWA Benefit Funds accounted for only 30 percent of national coal production. JA 246a.

with employees represented by the UMWA. Such bargaining could not hope to deal with the many former employers (such as petitioner Eastern, which had sold its coal mining subsidiary in 1987) that were out of the coal business or otherwise were no longer making contributions to the UMWA Funds to pay for the medical costs of their own retirees who were still receiving benefits from the Funds. In fact, by the 1990s, approximately 75% of the beneficiaries of the 1950 Benefit Trust and the 1974 Benefit Trust had no employment connection to any of the companies that were still contributing to the Funds.[13] Accordingly, the Commission recommended two alternative statutory approaches.

The Coal Commission's first approach called for the creation of a quasi-governmental corporation funded by an industry-wide assessment on all coal operators to finance the health care of UMWA orphan retirees, and a private multiemployer fund financed by signatories to the 1978 and later NBCWAs to provide health care to UMWA retirees whose last employer remained in business. JA 307a-310a. The second approach called for the creation of a single, private multiemployer plan, financed by a broadened base of present and former NBCWA signatories, to provide health benefits to UMWA retirees in the 1950 and 1974 Benefit Trusts, including the orphan retirees. JA 312a-316a. The second approach recommended by the Coal Commission specifically was designed to include a broadened group of former signatories such as petitioner Eastern:

> Instead of imposing a new tax on all coal operators and establishing an agency of the federal government, *this plan seeks additional revenues from a broadened base of current and past signatories to the contracts,* establishing and providing revenues for the Benefit Funds. Past obligations would be defined as those arising from firms once signatory who may be identified through a chain of succession to a current operator.

JA 312a (emphasis added).[14]

[13] *Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing Before the Subcomm. on Medicare and Long-Term Care of the Senate Comm. on Finance*, 102d Cong. 45 (1991) (testimony of Michael K. Reilly, President of Bituminous Coal Operators' Association, Inc.) ("for every dollar that signatory companies contribute for their own people, the same companies contribute $3 for retirees from companies no longer contributing").

4. *Enactment Of The Coal Act*

Following the Coal Commission's Report, Congress undertook its own intensive examination of the crisis. Initially, a hearing on the Coal Commission Report was held.[15] Thereafter, Senator Rockefeller introduced the Coal Industry Retiree Health Benefit Act of 1991 ("S. 1989"). S. 1989 adopted the first funding approach that had been advocated by the Coal Commission, albeit in a slightly modified form. It included a combination of an industry-wide assessment on all coal operators and a per-beneficiary premium on employers that had signed the 1978 or later NBCWAs.[16] This financing scheme was slightly altered and passed by Congress on March 20, 1992, as part of the sweeping Tax Fairness and Economic Growth Acceleration Act of 1992.[17] President Bush

[14] Eastern erroneously implies (Pet. Br. 12) that the Coal Commission sought funding contributions only from 1978 or later NBCWA signatories. That is not accurate. The Coal Commission's second funding mechanism contemplated contributions from *all* NBCWA signatories, and was not limited to companies that signed NBCWAs in 1978 or later. JA 312a, 313a, 314a. As the Commission stated in the Executive Summary of its report, "a statutory obligation to contribute to the plans should be imposed on current and former signatories to the National Bituminous Coal Wage Agreement." JA 237a.

[15] *See Coal Commission Report on Health Benefits of Retired Miners: Hearing Before the Subcomm. On Medicare and Long-Term Care of the Senate Comm. On Finance*, 102d Cong. (1991).

[16] S. 1989, 102d Cong. §§ 9701, 9704(g), 9723(6) (1991), *reprinted in* 137 Cong. Rec. S17,063-71 (1991).

[17] H.R. 4210, 102d Cong. (1992), *reprinted in* H.R. Conf. Rep. No. 102-461 (1992). Under this measure, different rates of assess-

vetoed this tax legislation. His veto message to Congress said nothing about the bill's provisions regarding retiree health care in the coal industry.[18]

Congress substantially revised the proposed financing scheme before the Coal Act was enacted into law. Instead of an industry-wide assessment on all coal operators, Congress adopted a funding mechanism that requires payments only from employers that were signatory to one or more NBCWAs. This financing arrangement is similar to the second approach that was recommended by the Coal Commission. Congress decided to impose liability not on all coal industry employers, but only on those employers that actually employed the retirees in the past under UMWA collective bargaining agreements:

> The essence of the Conference Agreement is that those companies which employed the retirees in question, and thereby benefitted from their services, will be assigned responsibility for providing the health care benefits promised in their various collective bargaining agreements.

138 Cong. Rec. S17,603 (daily ed. Oct. 8, 1992).[19]

In enacting the Coal Act, Congress found that

> it is necessary to modify the private health care benefit plan structures for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

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ment were to have applied to the eastern and western components of the coal industry. *Id.* at 275.

[18] *See* 28 Weekly Comp. Pres. Doc. 510 (March 20, 1992).

[19] As noted by Senator Rockefeller, "[t]he approach of the current legislation was not lightly arrived at. Lengthy and difficult negotiations were required because of the myriad of conflicting interests in our nationwide coal industry." 138 Cong. Rec. S10,783 (daily ed. July 29, 1992). *See also* 138 Cong. Rec. S17,605 (daily ed. Oct. 8, 1992) ("The method of assignment of eligible beneficiaries was the source of much debate and controversy prior to the Conference Agreement.").

Combined Fund App. 1a.[20] Congress stated that the policy of the Coal Act is

> to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry . . . [and] to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

Id.

The allocation of liability under the Coal Act is based on the fundamental principle that employers should pay for the retiree health care of their own former employees that were still receiving health benefits through the UMWA system. As Senator Rockefeller explained,

> Instead of including a broad industrywide tax, the basic funding mechanism of this legislation generally requires premium payments from those for whom the retirees worked. These are the responsible companies.

138 Cong. Rec. S17,633 (daily ed. Oct. 8, 1992).

Congress implemented this "pay for your own" policy in three ways in the Coal Act. First, and most relevant here, Congress created a new trust fund, the Combined Fund, to provide health and death benefits to surviving coal industry retirees and their dependents who, as of July 20, 1992, were eligible to receive, and were receiving, benefits from the UMWA 1950 or 1974 Benefit Trusts. 26 U.S.C. § 9703(a), (b)(1), (e), (f). To apportion the cost of these benefits, Congress directed the Secretary of HHS (now, the Commissioner of Social Security)[21] to

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[20] "Combined Fund App." refers to the appendix to the Combined Fund's brief in opposition to Eastern's petition for a writ of certiorari.

[21] Effective March 31, 1995, Congress transferred the Secretary's duties under the Coal Act to the Commissioner of Social Security ("Commissioner"). *See* 26 U.S.C. §§ 9704, 9706 (historical notes); Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, §§ 105(a)(2)(A), 108(h)(9), 108 Stat.

assign to signatory operators certain of their former employees who were among the Combined Fund's beneficiaries. *See* 26 U.S.C. §§ 9704, 9706.

Under the detailed statutory criteria governing these assignments (*see* 26 U.S.C. § 9706(a)), the Secretary was required to assign as many beneficiaries as possible to employers that signed the NBCWA or other coal wage agreement in 1978 or thereafter. Only if a retiree was never employed by a 1978 or later signatory, or if any such signatory that did employ the retiree was no longer in business, could the Secretary turn to earlier NBCWA signatories.[22] Each employer's annual health premium to

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1464, 1472, 1487-88 (1994). Accordingly, the Commissioner has been substituted for the Secretary in this case.

[22] Specifically, the Secretary first was required to assign each retiree to the employer that was signatory to the 1978 NBCWA or any subsequent NBCWA and that most recently employed the retiree for at least two years. 26 U.S.C. § 9706(a)(1). If the Secretary could not assign a retiree to a coal operator pursuant to this first method, she next was required to assign the retiree to the coal operator that was signatory to the 1978 NBCWA or any subsequent NBCWA, and that employed the retiree most recently in the coal industry, without regard to the number of years of employment. 26 U.S.C. § 9706(a)(2). Third, if the Secretary could not assign a retiree to a coal operator pursuant to the first two methods, she was required to assign the retiree to the pre-1978 signatory operator that employed the retiree for the longest period of time. 26 U.S.C. § 9706(a)(3). If the Secretary could not identify any NBCWA signatory operator that remains in business (or that has a "related person" remaining in business) and that formerly employed a particular retiree, the retiree was designated an "unassigned beneficiary." 26 U.S.C. §§ 9704(d), 9705.

Under these provisions, for example, a retiree who worked for Eastern for 20 years, and then worked for EACC for one day and retired, would be assigned to EACC and not Eastern because EACC is a post-1978 signatory still in business. Indeed, approximately half of the Combined Fund beneficiaries assigned to EACC retired prior to 1975 and thus necessarily accumulated most of their required 20 years of covered service while working for employers other than EACC (since, by Eastern's own admission, EACC did not operate Eastern's coal business until 1966).

the Combined Fund is then computed as the product of the number of the employer's assigned beneficiaries times the annual per beneficiary premium established by the Secretary under Section 9704(b)(2) of the Coal Act. *See* 26 U.S.C. § 9704(b)(1), (2).[23]

The second and third methods by which Congress implemented its "pay for your own policy" do not involve Combined Fund beneficiaries and have not been challenged by Eastern. They relate to the individual employer plans addressed in Section 9711 of the statute (26 U.S.C. § 9711) and to the UMWA 1992 Benefit Plan (the "1992 Plan"), which is a separate new trust fund created by the Coal Act. 26 U.S.C. § 9712.

In Section 9711, Congress required that all employers that, as of February 1, 1993, were providing health coverage to their own retirees and dependents under a contractual individual employer plan continue that plan for those beneficiaries for as long as the employer (or any related person) remains in business. Eastern is not affected by this requirement, because it was not maintaining a contractual individual employer plan as of February 1, 1993.

Congress designed the 1992 Plan to provide health benefits to eligible retirees who retired on or before September 30, 1994, are not beneficiaries of the Combined Fund, and are not receiving health coverage directly from their former employers. With respect to the 1992 Plan, Congress implemented the "pay for your own" principle

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[23] By its very nature, the Combined Fund is a "closed fund" into which no new retirees can be added. The Combined Fund's beneficiary population was fixed by reference to the beneficiary populations of the 1950 Benefit Trust and the 1974 Benefit Trust as of the statutorily prescribed date of July 20, 1992. As such, the Combined Fund's beneficiary population is steadily declining. Given the average age of the beneficiaries, the rate of decline is significant. When the Combined Fund began providing health benefits on February 1, 1993, its beneficiaries numbered nearly 109,000. As of December 31, 1997, that number had declined to just under 75,500.

by requiring the last signatory operator to which each 1992 Plan beneficiary is attributable to pay a monthly per beneficiary premium to cover the cost of that beneficiary's health care. *See* 26 U.S.C. § 9712(d)(1)(b), (3). Eastern has not been assessed any premiums for the 1992 Plan.

Under the Coal Act, Congress adopted different methods of providing for orphan beneficiaries in the Combined Fund and the 1992 Plan. In the Combined Fund, the cost of financing health care coverage for orphan retirees and their dependents (*i.e.*, beneficiaries who could not be assigned to any former employer) is to be shared on a proportionate basis by the employers that voluntarily participated in the UMWA multiemployer health benefits system and that have been assigned Combined Fund beneficiaries under the criteria set forth in Section 9706. The statute provides for an "unassigned beneficiaries premium," to be allocated among signatory operators on the basis of their pro rata share of the beneficiaries that have been assigned. 26 U.S.C. § 9704(d).[24]

To help alleviate the financial burden of health care for unassigned Combined Fund beneficiaries, Congress authorized three transfers of $70 million each to the Combined Fund from the UMWA 1950 Pension Plan and Trust ("1950 Pension Trust"). These transfers were made on the first day of each of the Combined Fund's first three fiscal years, and the retirees themselves thus helped to finance their own future health care. 26 U.S.C. § 9705. Thereafter, Congress authorized additional annual transfers, to be made from the Abandoned Mine Reclamation Fund established under the Surface Mining Control and Reclamation Act of 1977. *See* 26 U.S.C. §§ 9704(d), 9705, 30 U.S.C. § 1232(h) (1994). These transfers, the

[24] In the 1992 Plan, the cost of providing health care to beneficiaries for whom the Trustees do not receive monthly premiums from the beneficiaries' last signatory employer is covered by an annual assessment imposed only on signatories of the 1988 NBCWA. *See* 26 U.S.C. § 9712(d)(1)(A).

first three of which have amounted to more than $110 million, may be used only to defray the expense of providing health benefits to unassigned beneficiaries. To date, these transfers have completely offset the orphan beneficiary health care costs, and no assigned operator (including Eastern) has had to pay a penny for any orphan beneficiary. R 1907.

C. Eastern's 41-Year Participation In The UMWA Multiemployer Funds

Eastern repeatedly asserts in its brief to this Court that it "ceased coal operations" in 1965 and thus had been out of the coal business for "nearly thirty years" when the Coal Act was passed. This is a gross distortion. Eastern admits that its Coal Division became a wholly-owned subsidiary of Eastern in 1965 and continued to mine coal and generate substantial profits for Eastern until it was sold in 1987, but Eastern nevertheless proceeds as if its last 22 years of coal mining are irrelevant and should be ignored.

Eastern's assertions attempt to conceal Eastern's history as a major coal producer; its 41-year voluntary participation in, and benefit from, the UMWA multiemployer fund system; and Eastern's role in contributing to coal miners' expectations that, once they retired after 20 years in the mines, they would continue to receive health benefits from the UMWA multiemployer system.

1. *Eastern's Coal Operations From 1929 To 1987*

Eastern Gas and Fuel Associates, later known as Eastern Enterprises, was organized as a Massachusetts business trust in 1929. According to Eastern's records, it began mining and selling coal in 1929, as soon as the company was formed. R 277.

Eastern was a major coal producer and coal exporter. From 1962 through 1966, for example, it sold more than 50 million tons of coal from its own production, and nearly 20 million tons produced by other companies. R 269. In 1964, it received an award from the Department of Commerce as the leading United States producing

exporter of coal. R 269. Eastern repeatedly described itself as one of the largest coal producers in the United States. R 265, 376, 574.

Eastern's coal mining operations were located in West Virginia and Western Pennsylvania. R 271-74. It operated deep underground mines and employed thousands of UMWA-represented coal miners. R 269, 276. In the 1970s, for example, Eastern's coal mining operations employed approximately 4700 miners who were members of the UMWA. R 521.

Eastern tells this Court that it ceased coal operations in 1965, but that is not what it told Eastern's shareholders. In annual reports of Eastern Gas and Fuel Associates in the 1970s and 1980s, Eastern highlighted the substantial revenues produced by its coal subsidiary, EACC, which for many years generated for Eastern far greater revenues than its sister subsidiary, Boston Gas.[25] Eastern admits that between 1966 and 1987 its coal subsidiary produced for Eastern more than $100 million in dividends. Pet. Br. 6 n.13. In addition, the annual reports of Eastern Gas and Fuel Associates for this period are replete with references to "our" coal operations, include pictures of coal mining equipment, and provide financial data on coal-generated production and revenues. They do not depict a company that has "ceased" its coal operations.[26]

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[25] Annual reports for Eastern Gas and Fuel Associates for the years 1970, 1974, and 1980 were produced during discovery and have been lodged with the Clerk. From 1970 through 1974, Eastern's total coal revenue was $888 million, and its total gas revenue was $487 million. 1974 Ann. Report at Bates No. ET 005097. In other words, EACC generated nearly twice as much revenue as Boston Gas during those years and obviously was quite important to Eastern's shareholders. In a March 12, 1981 letter to shareholders, the President and CEO of Eastern Fuel and Gas Associates boasted of productivity gains in "our West Virginia coal operations," and stated that during the coming year "we expect to approach the 10 million ton level" of coal production. 1980 Ann. Report at Bates No. ET 004631.

[26] Contrary to the suggestions by Eastern in its brief, it is not necessary for the Court to "pierce the corporate veil" to consider the coal-related activities and coal-generated revenue of Eastern's wholly-owned subsidiary from 1966 to 1987. This is not a case involving principles of corporate law, and the Constitution does not limit Congress' legislative power by the manner in which multi-billion dollar conglomerates choose to structure their corporate formalities. *See, e.g.*, ERISA and Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), in which Congress imposed "control group" liability on sponsors of both single employer and multiemployer pension plans. 29 U.S.C. § 1301(b)(1).

2. *Eastern's Participation In, And Benefit From, The UMWA Funds*

Initially through its Coal Division and then through its wholly-owned coal subsidiary, Eastern voluntarily and actively participated in the UMWA Funds for four decades. In fact, Eastern participated in and contributed to the UMWA Funds from their inception in 1946 until Eastern sold its coal operations to Peabody in 1987.

From 1946 to 1965, Eastern was signatory to successive collective bargaining agreements with the UMWA. During that period, it was a member of the Bituminous Coal Operators' Association ("BCOA"), the multiemployer bargaining association that negotiated collective bargaining agreements with the UMWA. Eastern was signatory to the NBCWAs of 1947 and 1950, and the 1951, 1952, 1955, 1956, 1958, and 1964 amendments to the 1950 NBCWA. R 2626. From August 1946 through December 1965, Eastern contributed directly to, and its employees earned service credits toward benefits from, the UMWA multiemployer funds. R 2625-26. Thereafter, from 1966 until 1987, Eastern's wholly-owned subsidiary, EACC, was a member of BCOA and a signatory to the NBCWAs of 1968, 1971, 1974, 1978, 1981, and 1984. During this 22-year period, Eastern and its coal subsidiary were not only under common ownership and control but the top directors and officers of the coal subsidiary simultaneously served as directors and officers of Eastern. R 276, 349, 388.[27]

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[27] Under the Coal Act, Eastern has not been assigned liability for any of its former employees and retirees (or their dependents) who

Eastern's participation in the Funds benefited it in many ways. First, throughout this period, thousands of Eastern's employees and retirees, and their dependents, received comprehensive health and retirement benefits from the UMWA Funds. The Funds were the source of millions of dollars of health benefits provided directly to Eastern's employees, retirees, and their families. Second, as one of the original employers involved in the creation of the UMWA Funds, Eastern benefited from the UMWA's reciprocal agreement to permit employers to mechanize the mines. JA 265; *see also* 138 Cong. Rec. S17,632 (daily ed. Oct. 8, 1992) (statement of Sen. Rockefeller). This greatly increased coal production and employer profits. Third, the employers' collective agreement to participate in the Funds was a necessary element of securing labor peace with the UMWA. As stated by UMWA President John L. Lewis, "I don't know of anything that runs further into the emotions of a human being than the matter of our Welfare Fund, with its security for our people. It is a dream that has come true, long deferred through the centuries." R 942. Fourth, the Funds stabilized employment for Eastern and other participating employers, preventing the loss of skilled mine workers to other industries. R 976. Finally, the Funds benefited Eastern and other participating employers by providing "a major boost in miners' morale and on-the-job attitudes." *Id.*

3. *Eastern's Retirees' Expectations Of Lifetime Health Benefits*

Eastern repeatedly states in its brief that it did not "promise" its UMWA employees continued health benefits after they retire. It parses through contractual language and reservation-of-rights clauses as if those provisions, even if accurately interpreted by Eastern, would somehow limit Congress' authority to legislate. As the court of

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worked for Eastern's coal subsidiary between 1966 and 1987. Those beneficiaries, who numbered approximately 1860 as of October 1, 1993, have been assigned to EACC, now a wholly-owned subsidiary of Peabody. JA 144a.

appeals correctly noted, however, "this is a constitutional challenge, not a breach of contract case." Pet. App. A-13. The relevant inquiry is whether it was rational for Congress to assign Eastern liability for the Combined Fund's beneficiaries who can be traced to Eastern.

In addition to the "pay for your own" principle, which is sufficient in and of itself to demonstrate the rationality of the Coal Act, Congress had before it more than sufficient information to conclude that coal operators such as Eastern collectively contributed to miners' expectations that they would receive health benefits for themselves and their dependents throughout their retirement years.

First, the Coal Commission found that "[r]etired coal miners have legitimate expectations of health care benefits for life; that was the promise they received during their working lives and that is how they planned their retirement years." JA 245a-246a. The Coal Commission found, moreover, that the miners' expectation of lifetime health care was no mere reliance on some hoped-for gratuity; rather, it arose directly from the give-and-take of the collective bargaining process. Coal miners expected lifetime health benefits in part "because coal miners in their labor contracts have traded lower pensions over the years for better health care benefits." JA 236a.[28] For example, until the 1998 collective bargaining agreement, the monthly pension for a miner's widow was only $125. *See, e.g.*, R 830.

Second, when Congress held hearings on the Coal Commission report, it heard testimony from Funds beneficiaries, including the following from a representative UMWA retiree: "I went into the mine with the idea that when my time came, I could retire and have [health] benefits, plus a pension."[29] Similarly, a widow of a retired miner

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[28] Pensions for coal miners in the past have been substantially lower than for other industrial workers such as steel and auto workers. JA 295a.

[29] *Coal Commission Report on Health Benefits of Retired Coal Miners, Hearing Before the Subcomm. on Medicare and Long-Term*

testified that she and her family expected health benefits from the Funds because "[t]hat is what they promised him and that is what we planned on and what we believed." [30]

Third, the employer-appointed trustee to the 1950 W&R Fund, Charles A. Owen, informed all signatory coal operators by letter from the National Coal Association, dated November 5, 1951, that the Fund's medical benefits included "Hospitalization, Surgical and Medical Care for mine worker[s], including pensioners, and dependents during his life, without limit as to duration . . . ." R 1971-72.

Fourth, while miners such as Samuel East were providing labor to Eastern, they contemporaneously were accruing service credits to become eligible for a UMWA pension and retiree health benefits. Miners needed 20 years of service, among other things, to qualify for pension and retiree health benefits for themselves and their dependents. R 892-93, 909-10, 973-74. Eastern contributed to their legitimate expectations of retiree health benefits by signing, over a period of 41 years, successive collective bargaining agreements with the UMWA that provided such benefits. R 639, 707, 730, 748, 776-77.

Finally, federal courts consistently have found that, throughout the history of the UMWA Funds, signatory employers such as Eastern created a legitimate expectation that UMWA retirees would receive lifetime health benefits. No court has held to the contrary. *See United Mine Workers of America v. Nobel*, 720 F. Supp. 1169, 1173, 1178 (W.D. Pa. 1989), *aff'd without opinion*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991) (noting "25-year history of lifetime benefits prior to 1974"); *Grubbs v. UMWA*, 723 F. Supp. 123, 127 (W.D. Ark. 1989) ("From 1950 to 1974, the benefits

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Care of the Senate Finance Comm., 102d Cong. 5 (1991) (statement of Homer Eckley).

[30] *Id.* at 4 (statement of Dixie Woolum).

available to retired or disabled miners and their families were never decreased or eliminated and beneficiaries were entitled to receive pension and health benefits for life."). *See also District 29, United Mine Workers of America v. United Mine Workers of America 1974 Benefit Plan & Trust*, 826 F.2d 280, 282 (4th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988) ("we agree with the district court's conclusion that the intention of the parties in providing for retirement health benefits was to guarantee their provision for life."); *In Re Chateaugay Corp.*, 945 F.2d 1205, 1210 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1167 (1992) ("the retired employees are guaranteed the provision of health benefits for life under the collective bargaining agreement"). *See* JA 132a-134a.

SUMMARY OF ARGUMENT

The Coal Act does not violate the Due Process Clause. In reaching that conclusion, the court of appeals, like the numerous other federal courts that have sustained the constitutionality of the statute, relied on an unbroken line of decisions from this Court upholding economic legislation in the area of employee benefits. In a series of cases addressing the validity of congressional efforts to apportion liability for medical or pension costs arising out of the employment relationship, the Court long has recognized a presumption of constitutionality that can be rebutted only if it can be shown that Congress has acted arbitrarily or irrationally.

The Coal Act's assignment of liability to Eastern for the future costs of health benefits for some of Eastern's own retirees and their dependents is precisely the kind of economic regulatory measure to which this Court has accorded substantial deference. In the Coal Act, Congress carefully apportioned liability among various groups of employers, including NBCWA signatories like Eastern that are no longer in the coal business. Congress rationally chose to include such former signatories because they voluntarily participated in, and benefited from, the multi-employer system since its inception, profited from the

labor of the miners that have been assigned to them, directly contributed to the UMWA Funds' liabilities by awarding their miners' service credits, and contributed to miners' expectations that they and their dependents would receive medical care throughout retirement. There was nothing arbitrary or irrational about the legislative decision to allocate some retiree health care liability to Eastern.

Nor does the Coal Act violate the Takings Clause. Congress' decision to impose on Eastern the cost of providing health care for those retirees that never worked for a 1978 or later NBCWA signatory and that Eastern employed for longer than any other employer remaining in business is an economic regulatory measure that does not effect a taking within the meaning of the Fifth Amendment. The government has taken nothing for its own use, but has instead sought to provide for the continuation of a privately financed self-sufficient program. Neither fairness nor justice should permit Eastern to avoid all financial responsibility for its coal industry retirees and to have those costs shouldered by the general public or by other coal operators that never employed the retirees in question.

Eastern wrongly attempts to equate the Coal Act's monetary exactions with government action involving the invasion or complete deprivation of the use of land. This Court repeatedly has recognized that legislative enactments similar to the Coal Act are economic regulatory measures that do not constitute takings requiring government compensation. The economic impact of the Coal Act on Eastern is related directly to the number of coal miners who were actually employed by Eastern, who earned service credits through that employment, and who either survive today or are survived by eligible dependents. Further, given the unique history of the UMWA Funds, the pattern of federal involvement, and Eastern's own actions in creating Fund liabilities and creating in miners a legitimate expectation of lifetime benefits, Eastern had no reasonable investment-backed expectation that

it could walk away from its former employees and have someone else pay for their retiree health benefits.

ARGUMENT

I. THE COAL ACT COMPORTS WITH THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

At least 40 federal judges have considered the constitutionality of the Coal Act, and they have concluded unanimously that the statute is valid.[81] This is hardly surprising in view of the long line of cases from this Court that support this result. In attempting to overturn the court of appeals' decision, Eastern misstates the well-settled judicial standard for review of economic legislation, ignores the rationality of the plan chosen by Congress to apportion financial responsibility among various groups of coal operators, and either disregards or distorts the factors that Congress considered in assigning financial responsibility to former signatory employers such as Eastern.

A. The Court Of Appeals Applied The Correct Standard Of Judicial Review

This Court long has recognized Congress' right, with minimal judicial oversight, to address economic problems and to enact legislation to deal with those problems. *See*,

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[81] In the courts of appeals: Judges Selya, Cyr, and Stahl (1st Cir.); Judges Mahoney, McLaughlin, and Heaney (sitting by designation) (2d Cir.); Chief Judge Becker and Judges Mansmann and Brotman (sitting by designation) (3d Cir.); Chief Judge Wilkinson and Judges Widener, Murnaghan, Wilkins, Karen Williams, and Mackenzie (sitting by designation) (4th Cir.); Judges Keith, Brown, Nelson, Suhrheinrich, Siler, and Moore (6th Cir.); and Judges Cudahy, Cummings, and Kanne (7th Cir.). In the district courts: Judge Wolf (D. Mass.); Judge Martin (S.D.N.Y.); Judges Ambrose and Smith (W.D. Pa.); Judge Richard Williams (E.D. Va.); Judge Keeley (N.D. W. Va.); Chief Judge Haden and Judges Faber and Knapp (S.D. W. Va.); Chief Judge Buchmeyer (N.D. Tex.); Judge McKinley (W.D. Ky.); Judge Graham (S.D. Ohio); Judge Hull (E.D. Tenn.); Judge Tinder (S.D. Ind.); and Judges Kessler and Sullivan (D.D.C.).

e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("[C]ourts do not substitute their social and economic beliefs for the judgment of the legislative bodies, who are elected to pass laws."); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause . . . to strike down . . . laws because they may be unwise, improvident, or out of harmony with a particular school of thought."). The Court's traditional deference is directly attributable to Congress' unique ability to weigh competing interests and to assess the impact of its legislation. The fact that Congress' enactments "may have profound and far-reaching consequences . . . provides all the more reason for this Court to defer to the congressional judgment." *Duke Power v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 83-84 (1978).

It is well settled that economic legislation such as the Coal Act is entitled to a considerable presumption of constitutionality. As the Court emphasized in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), when reviewing the constitutionality of another statute (the Black Lung Benefits Act) that assigns liability to certain coal operators:

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

In determining whether Congress has acted in an arbitrary or irrational way, the Court looks only to determine whether economic legislation is "supported by a legitimate legislative purpose furthered by a rational means." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Economic legislation will be sustained so long as any conceivable rational basis exists for the statute under review, regardless of whether Congress articulated or even considered the rationale. *See FCC v.*

Beach Communications, Inc., 508 U.S. 307, 315 (1993) ("it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature").

In enacting economic legislation, Congress has "absolutely no obligation to select the scheme that a court later would find to be the fairest, but simply one that was rational and not arbitrary." *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 477 (1985). In addition, the Court has held that Congress' economic legislative choices are "not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communications*, 508 U.S. at 315. Moreover, under the rational basis test, there need not be a tight fit between the statute's purpose and the statutory means to further that purpose. *See, e.g., Heller v. Doe*, 509 U.S. 312, 321 (1993) ("Courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends."); *Concrete Pipe and Prods. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 639 (1993) ("under the deferential standard of review applied in substantive due process challenges to economic legislation there is no need for mathematical precision in the fit between justification and means.").[32]

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[32] Like the companies that challenged the Black Lung Benefits Act in *Turner Elkhorn* and the MPPAA in *R.A. Gray*, Eastern asks this Court to resuscitate *Railroad Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935), which is the last case in which the Court invalidated an Act of Congress on substantive due process grounds. *See* Pet. Br. at 25-26. This Court's more recent due process decisions make clear that *Alton* no longer "retains vitality." *See, e.g., Turner Elkhorn*, 428 U.S. at 19. Numerous lower courts also have "expressed doubts over the continued validity" of *Alton*. *See, e.g., Chew v. E. R. Quesada*, 182 F. Supp. 231, 232 (D.D.C. 1960) ("The evidence is overwhelming that *Alton* is no longer controlling law"); *LTV Steel Co. v. Shalala*, 53 F.3d 478, 487 (2d Cir. 1995) ("In both letter and spirit, Alton belongs to the long-discredited era of Lochner-style

Despite these repeated holdings and the fact that the Court has not invalidated any economic legislation on substantive due process grounds in more than 60 years, Eastern asserts that the Due Process Clause requires "a tight causal nexus between the harm addressed by the statute and the persons singled out to provide a remedy for that harm." Pet. Br. 35. Eastern's position is simply wrong. Eastern's call for a "tight causal nexus"—or, indeed, any kind of *causal* nexus—is directly contrary to the rational basis test applied by this Court. The radical new standard proposed by Eastern would result in a dramatic encroachment on legislative authority and would require, for every piece of economic regulatory legislation, a showing that every person asked to help solve a problem was a direct part of the problem's cause. The Due Process Clause imposes no such requirement.

In a further effort to circumvent this Court's due process rulings, Eastern asserts that the Coal Act is "retroactive" economic legislation and that it therefore is subject to heightened judicial scrutiny. Pet. Br. 22-26. Eastern's factual premise is misleading, and its call for a different standard of review is squarely contradicted by prior holdings of this Court.

The Coal Act required Eastern and other assigned operators to pay for their retirees' *future* health benefits, beginning on February 1, 1993. It expressly left unchanged, for the duration of the existing collective bargaining agreement (the 1988 NBCWA), the contractual regime for funding retiree health care in the coal industry. *See* 26 U.S.C. § 9708. The Coal Act made no provision for any health care prior to the statute's enactment date or, indeed, at any time prior to the termination of the 1988 NBCWA on February 1, 1993. As the Court re-

judicial activism") (citing cases). *See also* David P. Currie, *The Constitution in the Supreme Court: The Second World War, 1941-1946*, 87 Cath. U. L. Rev. 1, 12 (1987) (*Alton* belongs to the same period of "judicial arrogance" as *Lochner*). Moreover, *Alton* is readily distinguishable from this case, as the Second Circuit explained thoroughly in *LTV*. 53 F.3d at 488-89.

cently explained, "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994).

Nonetheless, Eastern maintains that the Coal Act is "retroactive" because it requires Eastern to pay for future health benefits for miners who retired before the effective date of the Act. Even if such future payments properly could be characterized as a retrospective liability, the Coal Act remains subject to a rational basis standard of review. That is what this Court held in *Turner Elkhorn*. 428 U.S. at 16-20. Eastern's reliance on that decision is misplaced.

In *Turner Elkhorn*, the Court considered whether the Black Lung Benefits Act violated the Due Process Clause by requiring coal operators to pay benefits of former employees who left employment in the industry before the effective date of the Act. Applying a rational basis test, the Court concluded:

> We find, however, that the imposition of liability for the effects of disabilities bred in the past *is justified as a rational measure* to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers.

428 U.S. at 18 (emphasis added).

In addition, as the Court clearly explained in its unanimous opinion in *R.A. Gray*, 467 U.S. at 729, Congress has wide latitude to regulate in the economic sphere, and even "retroactive" economic legislation is subject to the rational basis test:

> [T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wis-

dom of such legislation remain within the exclusive province of the legislative and executive branches.

B. The Coal Act Is The Product Of Rational Legislative Choices

Eastern does not challenge the legitimacy of the congressional purpose to resolve problems associated with the funding of health care for beneficiaries of the UMWA multiemployer plans. Eastern confines its attack to the means that Congress selected to accomplish this purpose. Contrary to Eastern's submission, those means are plainly rational.

With the benefit of the Coal Commission's report, and having considered various legislative proposals (and lobbying by every affected group) over the course of three years, Congress carefully crafted the Coal Act to apportion costs among various groups of employers and to mitigate the financial impact on those employers. For example, Congress placed a cap on the annual per beneficiary health premium for the Combined Fund, and it left open the possibility that benefit levels might need to be adjusted in the future if the Combined Fund's costs outstrip the annual Consumer Price Index adjustment of the per beneficiary premium. *See* 26 U.S.C. §§ 9703(b)(1), 9704(b)(2). To lessen the burden on employers in providing benefits for "orphan" retirees whose former employers are no longer in business, Congress provided for three annual transfers of $70 million each from the 1950 Pension Plan during the Combined Fund's first three years, and additional annual transfers in later years from the Abandoned Mine Reclamation Fund, in amounts of up to $70 million per year. 26 U.S.C. § 9705(b), 30 U.S.C. § 1232(h).

In formulating the financing rules for the Coal Act, Congress placed heaviest responsibility on those coal operators that signed the 1988 NBCWA, which was the collective bargaining agreement in effect when the statute was enacted. The 1988 NBCWA signatories were responsible for the start-up costs of the Combined Fund. 26 U.S.C. § 9704(i). Congress also required the 1988 signatories to continue their existing individual employer plans ("IEPs") for UMWA beneficiaries, to guarantee benefits for any beneficiaries of the 1992 Plan who are "orphaned" by their former employers, and to secure a proportionate share of the projected future cost of providing health benefits to the beneficiaries in the employers' IEPs and in the 1992 Plan. 26 U.S.C. § 9711, § 9712(d). Companies such as Eastern were exempted from these 1992 Plan requirements, and they also have no IEP obligation under Section 9711.

Congress apportioned the next greatest amount of responsibility to 1978 or later NBCWA signatories, by placing them first in the hierarchy of assignment priorities for Combined Fund beneficiaries.[83] *See* 26 U.S.C. § 9706(a). Thus, if a beneficiary worked, even briefly, for a coal industry employer that signed a 1978 or later NBCWA and was still "in business," the beneficiary would be assigned to the 1978 or later NBCWA signatory employer, even if he worked for a much longer period for an employer such as Eastern that only signed earlier NBCWAs.[84] Congress also excluded non-union and west-

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[83] Post-1978 signatories rationally could have been assigned greater responsibility than pre-1978 signatories for several reasons: (a) they employed the retirees more recently in the coal business; (b) they signed the contractual "guarantee clause" that guaranteed benefits from the 1950 and 1974 Benefit Trusts during the term of the agreements in which the clause appeared; and (c) they agreed, pursuant to the "evergreen clause" incorporated into the NBCWAs, to continue contributing to the UMWA Funds for as long as successor NBCWAs required such contributions. *See generally* JA 300a-303a.

[84] This provision has substantially reduced Eastern's liability under the Coal Act. For example, none of the 4,000 employees who transferred from Eastern to EACC in 1965 have been assigned to Eastern because all of those employees, by definition, worked for a post-1978 signatory that is still in business—EACC. In other words, even though Eastern made substantial profits from the labor of its EACC employees between 1965 and 1987 (*i.e.*, more than $100 million

efn coal companies that had not participated in the UMWA Funds. *See* 138 Cong. Rec. S17,603 (discussing decision not to include "western State coal companies which had no involvement in the UMWA-BCOA agreement") (remarks of Senator Wallop).

C. The Coal Act's Financing Plan Is Rational As Applied To Former Signatory Employers Such As Eastern

The history of the UMWA Funds and the financial crisis that led to the passage of the Coal Act demonstrates that Congress acted rationally in apportioning employer funding responsibility under the statute to both current and former signatory employers, including pre-1978 signatories. It was rational for Congress to include both current and former signatories for several reasons, including: (1) both current and former signatories had thousands of former employees receiving comprehensive benefits from the UMWA Funds at the time the statute was enacted, (2) both current and former signatories had employed the retired miners and profited from their labor, (3) both current and former signatories directly contributed to the Funds' liabilities by awarding the miners service credits, which resulted in their becoming eligible for pensions and retiree health benefits, and (4) both current and former signatories contributed to the miners' expectations that they would receive lifetime medical care for themselves and their dependents.[35]

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in dividends), Eastern has not been assigned liability for any of those employees who are now receiving benefits from the Combined Fund. All of that liability has been assigned to EACC, now a wholly-owned subsidiary of Peabody, or to some other post-1978 signatory.

[35] Congress' decision to include in the Coal Act not only employers that were participating in the UMWA Funds at the time of the statute's enactment but also employers that participated in the past and still had former employees or their dependents in the UMWA Funds as of the date of the statute is hardly the "unprecedented" measure that Eastern makes it out to be. Under the Comprehensive Environmental Response, Liability, and Compensation Act ("CERCLA"), for example, any release of a hazardous waste, no matter how small and no matter when it occurred in the past, can result in joint and several liability for the entire cost of cleaning up the site where the release occurred. *See, e.g., United States v. Northeastern Pharmaceutical and Chemical Co.*, 810 F.2d 726, 734 (8th Cir. 1986) (retroactive effect of CERCLA upheld).

This Court's decisions support the rationality of the legislative choice. *See, e.g., Turner Elkhorn*, 428 U.S. at 18 (it is rational for Congress "to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor"); *Concrete Pipe*, 508 U.S. at 638 (rational basis exists to assign responsibility to employer that "has contributed to the plan's probable liability by providing employees with service credits.").

In addition, it was rational for Congress to conclude that both current and former signatory employers, by voluntarily signing successive NBCWAs that provided for comprehensive health care for more than 40 years, collectively contributed to miners' expectations that once they retired, they would receive lifetime health benefits for themselves and their dependents. As the court of appeals correctly observed, whether Eastern or other signatory employers made a binding contractual promise of lifetime benefits is irrelevant. Congress' ability to enact remedial legislation cannot be eclipsed by, or restricted to, private contractual terms or disclaimers. *See Connolly*, 475 U.S. at 223-24 ("contracts, however express, cannot fetter the constitutional authority of Congress").

Eastern's assertion that the Coal Act shifts to former signatories part of an obligation voluntarily assumed by current coal operators (Pet. Br. 34-35) is erroneous and reflects a fundamental misunderstanding of the problem that Congress confronted in the Coal Act. As Eastern itself concedes elsewhere in its brief (Pet. Br. 9), *every* NBCWA since 1946, including not only the agreements signed by Eastern but also the more recent agreements through and including the 1988 NBCWA, imposed contribution requirements that applied "[d]uring the life of this Agreement . . . ." *See, e.g.*, R 819. When Congress

acted in 1992, therefore, it was concerned not with the brief remaining term of the 1988 NBCWA but with what was going to occur after the five-year term of that agreement came to end on February 1, 1993. At that point, the argument that Eastern makes now would have been equally available to the 1988 signatories, *i.e.*, they too could have contended that they had fulfilled their contractual contribution requirements and that they had no further obligation to participate in funding health care for the beneficiaries of the UMWA Funds. *See, e.g.*, JA 322a-323a (statement of Vice Chairman Henry H. Perritt). The Coal Act, in short, was designed not to shift any contractual obligation already undertaken but to provide a rational allocation of the financial burden of providing health care during future periods not yet covered by any collective bargaining agreement.

II. EASTERN'S COAL ACT LIABILITY IS NOT AN UNCONSTITUTIONAL TAKING OF PROPERTY

The Coal Act is a rational economic regulatory measure that falls well within Congress' legislative power. Like other such measures that have been sustained by this Court, the statute does not effect a taking that triggers the "just compensation" requirement of the Fifth Amendment. The Coal Act readjusts economic burdens to preserve a privately-financed multiemployer health benefit fund for thousands of coal industry retirees and their dependents. By its claim under the Takings Clause, Eastern is attempting to avoid all financial responsibility for its coal industry retirees and to foist those financial obligations either on other signatory operators or on the general public.[36] The Takings Clause does not require any such result.

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[36] Eastern itself says that, if its position were accepted, other coal operators would be required to pay for the health care of Eastern's retirees. Pet. Br. 18 n.36. By contrast, Pittston, whose own efforts to dump its retiree health care costs onto other employers played such a central role in the genesis of the Coal Act, now has the temerity to argue that, if Eastern were to prevail in its attack on the Coal Act, then the entire statute would need to be stricken, because otherwise employers like Pittston might have to contribute toward the health care costs of persons whom they never employed, namely, Eastern's retirees. *See* Pittston Amicus Br. 2-3, 6-7.

Although this Court has "eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment" and has instead engaged in an ad hoc factual inquiry into the "circumstances of each particular case," *Connolly*, 475 U.S. at 224, the Court consistently has looked to three factors that it has found to be of "particular significance" in evaluating Takings Clause claims. *Id.* at 225; *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978). These factors are (1) the character of the government's action, (2) the economic impact of the regulation on the claimant, and (3) the extent to which the regulation has interfered with the claimant's distinct and reasonable investment-backed expectations. *Id.* at 124-25. *See also Connolly*, 475 U.S. at 224-25; *Concrete Pipe*, 508 U.S. at 643-44. As the court of appeals correctly held (Pet. App. A-19 to A-23), each of these factors militates in favor of the validity of the Coal Act as applied to Eastern.

A. The Coal Act Is Valid Economic Regulation That Adjusts The Benefits And Burdens Of Economic Life

The Court has accorded Congress substantial leeway under both the Due Process and the Takings Clauses in devising financing mechanisms for economic regulatory programs. Indeed, the Court has stated, that when economic regulation has survived a due process challenge, it "would be surprising indeed to discover" that the statute effects an uncompensated taking. *Connolly*, 475 U.S. at 223. The Court made this statement in the course of unanimously sustaining the MPPAA against a Takings Clause challenge, after the Court already had upheld the same statute against a due process attack in *R. A. Gray*, 467 U.S. at 734. *See also Concrete Pipe*, 508 U.S. at 641.

The Coal Act reflects a reasoned congressional judgment that the financial responsibility for preserving the UMWA multiemployer health benefit plans should be borne by the current and former unionized coal employers that voluntarily participated in and benefited from the plans over the years. After considering other alternatives, Congress rationally concluded that the responsibility should not rest with a narrower group of employers or with the entire coal industry or the general public. Congress sought "to facilitate a private party solution, not create a new federal entitlement program or establish a precedent for other federal action." 138 Cong. Rec. S17,603 (daily ed. Oct. 8, 1992). As Congress said in the statute itself, the Coal Act is intended "to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans" and "to identify persons most responsible for plan liabilities in order to stabilize plan funding . . . ." Combined Fund App. 1a.

The Coal Act is thus precisely the kind of economic regulation that the Court has been reluctant to characterize as a taking. As in *Connolly*, the government "has taken nothing for its own use," 475 U.S. at 224, nor has it otherwise "acted for its own advantage." *Armstrong v. United States*, 364 U.S. 40, 48 (1960). *Connolly* recognized that the pension plan withdrawal liability imposed by the MPPAA "permanently deprived [a covered employer] of those assets necessary to satisfy its statutory obligation," 475 U.S. at 222, but the Court nevertheless concluded that Congress enjoys wide latitude to regulate in the economic realm (*id.* at 223):

> In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of action that did not previously exist. Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.

The Court in *Connolly* deferred to the judgment of Congress in determining the appropriate statutory scheme to protect the solvency of private multiemployer pension plans. The Court therefore sustained the legislative determination that the responsibility for rescuing privately-financed pension plans should rest with the employers that voluntarily participated in those plans, and not with the general public:

> We are far from persuaded that fairness and justice require the public, rather than the withdrawing employers and other parties to pension plan agreements, to shoulder the responsibility for rescuing plans that are in financial trouble. . . . We see no constitutionally compelled reason to require the Treasury to assume the financial burden of attaining this goal.

475 U.S. at 227-28.

Like the MPPAA, the Coal Act imposes financial liability on employer participants in multiemployer benefit plans, so as to safeguard and ensure the financial well-being of those plans. That is the character of the governmental action. Any "interference with [Eastern's] property rights . . . arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under [the Court's] cases, does not constitute a taking requiring Government compensation." *Connolly*, 475 U.S. at 225.

Eastern attempts to treat the Coal Act as if it were a physical invasion of real property or a form of land-use regulation. This Court has rejected such efforts to equate economic regulatory measures with deprivations of the use of land. In *Concrete Pipe*, for example, the Court stated:

> We reject Concrete Pipe's contention that the appropriate analytical framework is the one employed in our cases dealing with permanent physical occupation or destruction of economically beneficial use of real property. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

508 U.S. at 643. Likewise, in *United States v. Sperry Corp.*, 493 U.S. 52 (1989), the Court elaborated on the difference between government assessments of monetary liability and physical occupation of, or other intrusions on, real property:

> It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. . . . If the deduction in this case were a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of *Loretto* [*v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (finding a per se taking where landlords were required to allow television cable companies to place cable facilities in apartment buildings)].

Id. at 62 n.[37]

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), which involved a constitutional challenge to a state land-use regulation, the Court stressed the distinction between such a measure and mere economic regulation of personal property. In the Court's words, "in the case of personal property, by reason of the State's high degree of control over commercial dealings, [an owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically

[37] *See also Branch v. United States*, 69 F.3d 1571, 1576 (Fed. Cir. 1995), *cert. denied*, 117 S. Ct. 55 (1996) (rejecting a Takings Clause challenge to the provisions in the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") that imposed on banks owned by a single holding company liability for the debts of any failed banks within the group; "the principles of takings law that apply to real property do not apply in the same manner to statutes imposing monetary liability."); *Meriden Trust & Safe Deposit Co. v. Federal Deposit Ins. Corp.*, 62 F.3d 449, 455 n.2 (2d Cir. 1995) (same); *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir. 1990) ("Requiring money to be spent is not a taking of property.").

productive use is sale or manufacture for sale)." *Id.* at 1027-28. Eastern's extended reliance on *Lucas* and on other land-use cases such as *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), is thus misplaced in this case.

Nor is Eastern helped by *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), which Eastern cites throughout its brief. In *Webb's*, the Florida legislature mandated that the interest that accrued on an interpleader fund held by a state court "shall be deemed income of the office of the clerk of the circuit court." The legislature imposed this rule even though it had directed separately that the clerk take a percentage fee on the very same account "for services rendered." *Id.* at 156 n.1, 157. The legislature offered no justification for its declaration that the accrued interest should be deemed income of the office of the clerk. *Id.* at 163. This Court held that in the absence of "any reasonable basis to sustain the taking of the interest earned by the interpleader fund," the interest was "a forced contribution to general governmental revenues, [which was] not reasonably related to the costs of using the courts." *Id.* The governmental action in *Webb's* is not even remotely similar to the governmental action in the Coal Act.

B. The Economic Impact Of The Coal Act Is Reasonably Related To Eastern's Experience Under The UMWA Funds

As recognized by the court of appeals, the economic impact of the Coal Act is reasonably related to Eastern's experience with the Funds. Significantly, Eastern's assignment of responsibility is tailored to the number of Eastern's retirees, and their dependents, who currently are receiving benefits from the Combined Fund. The number of Eastern retirees currently receiving benefits from the Fund is related to the length of time Eastern participated in the Fund, the size of Eastern as a major coal industry employer with a large number of employees, and the last

date on which Eastern was signatory to a collective bargaining agreement with the UMWA. Because Eastern's liability under the Coal Act "directly depends on the relationship between the employer and the plan to which it had made contributions," the economic impact of the regulation does not support Eastern's takings claim. *Connolly*, 475 U.S. at 225.

Eastern repeatedly states in its brief that it has estimated its total undiscounted Coal Act liability to be "more than $100 million." Pet. Br. at 2. This is almost certainly an overestimation. Indeed, in its official filing with the Securities and Exchange Commission, Eastern has estimated its total undiscounted Coal Act liability to be $80 million before taxes. *See* Eastern's Annual Report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ending December 31, 1996 (Comm. File No. 1-2297) at Form 10-K/28. After taxes, Eastern has estimated its own undiscounted liability to be $51 million. *Id.* In any event, as Eastern concedes, the precise amount of Eastern's liability is not dispositive. *See Concrete Pipe*, 508 U.S. at 645 ("[O]ur cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.").[38]

Moreover, the Court in *Connolly* ruled that assessing withdrawal liability on an employer leaving a multiemployer pension plan did not constitute a taking where the statute contained provisions "that moderate and mitigate the economic impact of an individual employer's liability." *Connolly*, 475 U.S. at 225-26. That is precisely

[38] This Court has held, for example, that a 92.5% diminution in the value of property is permissible under the Takings Clause. *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915). *See also Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (approximately 75% diminution in value not impermissible under the Takings Clause); *Concrete Pipe*, 508 U.S. at 645 (alleged 46% diminution in value not impermissible). In any event, Eastern has made no allegation that the amount of its Coal Act liability is disproportionate to its total assets.

the situation under the Coal Act. First, the assignment process set forth in 26 U.S.C. § 9706(a) creates a hierarchy in which companies like Eastern are assigned only beneficiaries who never worked for a 1978 or later NBCWA signatory. Eastern itself has benefited from this assignment scheme. Many beneficiaries who worked for Eastern, perhaps for many years, have been assigned to other employers that were 1978 or later NBCWA signatories. Other provisions in the Coal Act that mitigate employers' liabilities are provisions providing for three annual transfers of $70 million each (a total of $210 million) from the UMWA 1950 Pension Trust, and transfers from the Abandoned Mine Reclamation Fund (more than $110 million to date), to cover orphan beneficiaries. To date, these transfers have completely covered the cost of the "orphan" beneficiaries, as Eastern admits.[39]

C. Eastern Had No Distinct And Reasonable Investment-Backed Expectation That It Could Escape Responsibility For Its Former Employees In The UMWA Funds

Eastern attempts to wash its hands of all responsibility for its former coal miners and their families. Eastern contends that the Coal Act has interfered with its distinct and reasonable investment-backed expectations because it "confined [its] operational liabilities" to its subsidiary EACC in 1965, and then sold all of EACC's stock to Peabody in 1987. Eastern's argument is without merit for several reasons.

First, in *Connolly*, the Court rejected arguments from employers asserting that they had no reasonable expectations that they would be required to pay withdrawal lia-

[39] Further, in creating the Combined Fund, Congress closed the beneficiary pool, ensuring that the liability of Eastern and other signatory operators would decrease over time, as the natural result of the mortality of an aged beneficiary population. Indeed, approximately a third of the Combined Fund beneficiaries assigned to Eastern have died since the Combined Fund began providing benefits on February 1, 1993.

bility to multiemployer pension plans. The Court explained, among other things, that pension plans "were the objects of legislative concern long before the passage of ERISA in 1974." 475 U.S. at 226. Eastern's argument is even more untenable than the petitioners' in *Connolly*, because the government helped to create the UMWA Funds that are the subject of the Coal Act, and has periodically intervened in various ways to assist and protect the Funds and thus to ensure the continuation of their health care coverage.

Eastern and similarly situated employers knew from the very beginning of their participation in the multiemployer health plans that the government could step in to regulate the plans' administration and funding. Indeed, employer anticipation of the possibility of future government regulation of UMWA health benefits was publicly expressed as early as 1953, when Joseph Moody, the President of the Southern Coal Operators' Association, acknowledged that beneficiaries had been "promised" and had "grown accustomed to" receiving benefits from the 1950 W&R Fund, and he predicted that "[i]t is entirely conceivable that Congress, with an eye to the danger of complete disruption of the domestic coal industry—and to the votes involved—might decide it was necessary to step in and take over the mines, assuming responsibility for the welfare collection and payment." R 2000.

Congress did later intervene to assist the Funds and employers like Eastern in a variety of ways. As noted previously, Congress provided money to help the Funds sell the hospitals they had built. Congress amended the tax code to grant tax relief to contributing operators in 1954, and then again in 1974. In the 1960s and 1970s, Congress passed legislation obligating employers to devote substantial resources to mine safety and to the treatment of related health issues, such as Black Lung. *See generally* Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742, 30 U.S.C. §§ 801 *et seq.*

As the court of appeals observed, Eastern's attempt to "feign astonishment" regarding its obligations under the

Coal Act should not be credited. The unique history of the UMWA Funds, the pattern of federal involvement, and the fact that Eastern contributed to the beneficiaries' expectation of lifetime health benefits all undermine Eastern's protestations. "Having contributed to the expectation of lifetime health benefits for miners, Eastern had every reason to anticipate that it might be called upon to bear some of the financial burden that this expectation engendered." Pet. App. A-22.

Eastern asserts that, if miners developed an expectation of lifetime benefits, "it cannot be traced to Eastern." Pet. Br. 42. That is not correct. As noted above, the expectation of lifetime benefits was created in the 1940s and 1950s when the Funds were created. The employers' negotiation of successive labor agreements perpetuating the Funds furthered that expectation. *See, e.g., UMWA v. Nobel*, 720 F. Supp. 1169 (W.D. Pa. 1989), *aff'd without opinion*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991) ("25-year history of lifetime benefits prior to 1974"). *See also* pp. 28-29, *supra*.

Eastern's role in creating an expectation of lifetime health benefits can be traced to post-1965 events as well. Specifically, EACC was a wholly-owned subsidiary of Eastern from 1965 to 1987. Eastern's top corporate executives simultaneously served on the Board of Directors of both Eastern and EACC. During this time that Eastern and EACC were under common control, EACC was signatory to the NBCWAs of 1974, 1978, 1981, and 1984. Each of those Agreements expressly stated that beneficiaries of the UMWA multiemployer benefit plans (the 1950 Benefit Trust and the 1974 Benefit Trust), including retired and disabled miners and their eligible dependents, would be entitled to retain their Health Services card "for life," or "until death," or, in the case of a widow, "until her death or remarriage." *See, e.g.*, R 755-58 (1974 NBCWA); R 788-92 (1978 NBCWA). Since Eastern owned and controlled EACC at the time that EACC became signatory to agreements containing this language, Eastern can hardly claim surprise that Congress linked

Eastern, as well as EACC, to the retirees' expectation of lifetime benefits.

The passage of MPPAA in 1980 provided Eastern with further notice that federal regulation might be forthcoming to prevent it from walking away from the UMWA health benefit funds without any liability. In MPPAA, Congress created withdrawal liability for employers that withdraw from multiemployer pension plans. The liability extends not only to signatory employers, but also to their corporate parents and others within the corporate "control group" as defined by the statute. *See* 29 U.S.C. § 1301(b)(1). Under this provision, Eastern would have been liable if its subsidiary, EACC, had withdrawn from the UMWA multiemployer pension plans. Eastern was exposed to this liability from 1980, when MPPAA was passed, until 1987, when it sold EACC to Peabody.

Therefore, as recently as five years prior to the passage of the Coal Act, Eastern was, or should have been, aware of a federal regulation that exposed it to substantial liability associated with the UMWA multiemployer Funds, even though Eastern had transferred its coal operations to EACC in 1965. Under MPPAA, Congress looked beyond intra-corporate relationships to assign liability to the entire corporate family. Given the unique history of the UMWA multiemployer health care system, the pattern of federal government involvement, Eastern's voluntary participation in the Funds for more than 40 years, and Eastern's actions in contributing to miners' expectations of lifetime health benefits, Eastern could not have entertained any "distinct" and "reasonable" investment-backed expectation that it would never be called upon to contribute to the funding of its retirees' health care.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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